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No. 565

# Supreme Court of the United States

(OCTOBER TERM, 1945)

MUSKOGEE ELECTRIC TRACTION COMPANY,
a corporation,
*Petitioner,*

VERSUS

VICTORY INVESTMENT CORPORATION,
a corporation,
*Respondent.*

## BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1945.

UTTERBACK TYPESETTING CO., 13 S. Walker, Oklahoma City 4, Okla.

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## INTRODUCTORY

This is an action by a bondholder, for a money judgment only, on 86 corporate refunding bonds, for $1,000.00 each, dated May 1, 1912, maturing May 1, 1934, and no payments were made after maturity. The original Complaint was filed December 22, 1943 (R. 5) and the Amended Complaint on September 8, 1944 (R. 4).

The petitioner pleaded the statute of limitations. Respondent contended the statute was continually tolled and extended to December 1, 1945, by written acknowledgments

of the debt contained in petitioner's financial reports, made in pursuance of the trust agreement to the trustee as agent for the bondholders, from 1932 to December 1, 1940, wherein the bonded debt was listed as a current liability, and by concurrent acknowledgments made in its annual reports to the Oklahoma Corporation Commission.

## OPINION BELOW

The opinion of the Circuit Court of Appeals was in favor of the respondent, appellant therein, and is now reported in 150 Fed. (2d) 889.

## RESPONSE TO PETITION

In response to the petition for writ of certiorari, we respectfully urge that the question of the statute of limitations is one of local law, controlled by the State statutes and decisions; that the decision of the Circuit Court is not in conflict with, but follows the Oklahoma law, and the petition should be denied.

## STATEMENT

The agreed findings of fact approved and adopted by the trial court (R. 30 to 37), show, among others, the following facts:

The bonds were issued in the principal amount of $600,000.00 (FF. II, R. 31) secured by trust mortgage (FF. III, R. 31), and sold to the public on open market,

and at date of trial, bonds for $298,000.00 were held in the trust sinking fund and $302,000.00 were outstanding in the hands of the public (FF. V, R. 32).

The Trust Agreement provides in substance that the debtor will make annual written reports to the trustee of its operations, including "among other things" its Gross Income, sources thereof, Operating Expenses, etc., "and any other data which the trustee may require, and such statements shall be open to the inspection of the bondholders." (FF. III, R. 31, 32).

Typewritten financial statements of the debtor were forwarded to the trustee from the office of the debtor on various dates from March 5, 1932, to December 1, 1940, each containing substantially the same statements relied upon by Respondent as an acknowledgment of the debt, as follows:

On page 1, Comparative statement of Income, there is listed:

> "III Deduction from Gross Income, 220 Interest First Mortgage Bonds—$10,000.00."

On page 10, General Trial Balance, there are listed as liabilities the following:

"

| Account Number | Designation | Amount |
|---|---|---|
| 407 | Cash-Bondholders Account | $ 7,193.05 |
| 433 | Matured Interest Unpaid | 255,000.00 |
| 434 | Matured Funded Debt | 600,000.00 |
| 434 | Matured 2% Tax on Bonds | 4,800.00" |

Items 433 and 434 are again listed as "liabilities" on the General Balance Sheet.

None of these statements bear any signature, but each was forwarded with a typewritten letter on the letterhead of the Muskogee Electric Traction Company over the signature of its General Manager, each letter stating there was enclosed therewith, "Operating, Financial and Statistical Reports and Statements of the Muskogee Electric Traction Company for the" respective periods covered by each report, to and including the month of August, 1940. The last letter was dated December 1, 1940 (FF. VIII, R. 34, 35).

On April 4, 1941, petitioner filed its annual report for the year 1940, with the Corporation Commission, verified by William E. Hyde as Vice-President and R. H. Alexander as General Manager-Secretary-Treasurer, which listed under the heading "Current Liabilities" the following:

"Matured Interest, dividends and rents unpaid* $240,100.00

"Matured funded debt unpaid** $302,000.00

"*—Includes $240,100.00 matured interest in default for as long as 90 days on a principal of $600,000.00.

"**—Excludes $298,000.00 matured funded debt held by or for respondent and not cancelled.

"Under Schedule 275, headed 'Matured Funded Debt Unpaid,' appears the following:

| Name of Security | Reason for Non-payment at Maturity | Date of Issue | Date of Maturity | Rate of Interest | Total Par Value Actually Outstanding at Close of Year. |
|---|---|---|---|---|---|
| 1st Mortgage Bonds (FF. IX, R. 36). | Unable | 5-1-12 | 5-1-34 | 5% | $302,000.00" |

Respondent purchased the bonds sued on, relying upon the statements and reports above referred to as sufficient to toll the operation of the statute of limitations (FF. X, R. 37).

## ARGUMENT AND AUTHORITIES

**The statute of limitations is controlled by the law of the State. The decision of the Circuit Court of Appeals is based upon and in complete accord with applicable Oklahoma statutes and decisions, and the petition should be denied.**

Certiorari will be exercised sparingly and only upon questions of gravity and importance. *United States* v. *Johnston,* 268 U. S. 225, 69 L. Ed. 925.

The writ will not be granted to review the evidence and discuss specific facts. *Southern Power Company* v. *North Carolina Public Service Company,* 263 U. S. 508, 44 Sup. Ct. 164, 68 L. Ed. 413. *General Talking Pictures Corporation* v. *Western Electric Company, Inc., et al.,* 304 U. S. 175, 58 Sup. Ct. 849, 82 L. Ed. 1273.

The statute of limitations is a question controlled by the law of the State. *Erie R. Co.* v. *Tompkins,* 304 U. S. 641, 58 Sup. Ct. 817, 82 L. Ed. 1188; *Guaranty Trust Company* v. *York,* 65 Sup. Ct. 1464, 89 L. Ed. 1418.

The applicable five-year statute of limitations (Sec. 95, Title 12, Okla. Stat. 1941, cited and quoted by Petitioner), is tolled by a written acknowledgment of the debt under Section 101, Title 12, O. S. 1941 (also cited and quoted by petitioner).

In Oklahoma, an acknowledgment of a debt sufficient to toll the statute of limitations under 12 O. S. 1941, Sec. 101, need not be in any particular form. *Stone* v. *Smoot, et ux.*, 191 Okla. 512, 131 Pac. (2d) 85; *Baker* v. *Christy*, 172 Okla. 32, 44 Pac. (2d) 16.

Neither the amount of the debt nor its exact nature need be definitely stated. *Stone* v. *Smoot, et ux., supra.*

All that is necessary is that the debtor manifest in a writing, signed by him, an acknowledgment of the existing debt or liability. The acknowledgment is not required to be expressly stated, but language from which it may be fairly inferred, is sufficient. *Stone* v. *Smoot, et ux., supra; Baker* v. *Christy, supra.* It need not express or infer a willingness to pay. *Baker* v. *Christy, supra.*

The cause of action is on the bonds, the acknowledgment being no part thereof, but simply starts the statute of limitations running anew. *York* v. *Long*, 186 Okla. 643, 99 Pac. (2d) 1041.

It is shown in the case at bar that each report was typewritten and enclosed with a typewritten letter, on the letterhead of the corporation, over the signature of its general manager, specifically referring to the financial statements enclosed. Where a signed statement refers to another written statement for particulars, the separate writings are to be construed together as one instrument, especially where they are a part of the same transaction. *Searles* v. *Gonzales*, 191 Calif. 426, 216 Pac. 1003, 28

A. L. R. 78; *Bayne* v. *Wiggins*, 139 U. S. 210, 11 Sup. Ct. 521, 35 L. Ed. 144; *McLendon* v. *Ebbs*, 173 N. C. 603, 92 S. E. 498; *Black* v. *Hanz*, Tex. Civ. App., 146 S. W. 309.

The cardinal rule in the interpretation of contracts is to ascertain the mutual intention of the parties at the time of the execution thereof, and to give effect to that intention. *Texas Co.* v. *Adelman*, 186 Okla. 663, 99 Pac. (2d) 874, 127 A. L. R. 945; *New York Casualty Co.* v. *Sinclair Refining Co.*, (C. C. A. 10), 108 Fed. (2d) 65. And the subsequent acts and conduct of the corporation in repeatedly submitting the financial statements scheduling the bonded indebtedness as an existing liability under the trust agreement and over a long period of years, may be considered in arriving at the intention and interpretation of the parties to the trust agreement. *D'Yarmett* v. *School District No. 27 Canadian County*, 72 Okla. 124, 179 Pac. 20; *Gladys Belle Oil Co.* v. *Clark*, 147 Okla. 211, 296 Pac. 461; *Washoma Petroleum Co.* v. *Eason Oil Co.*, 173 Okla. 430, 49 Pac. (2d) 709; *McDowell* v. *Droz*, 179 Okla. 119, 64 Pac. (2d) 1210. Applying these rules, it is clear the intention of the parties was that such financial statements should be made to the trustee in pursuance of the trust agreement, and were so made. If this were not so, why did they make the statements? The very act of compiling and submitting the reports to the trustee, recognized the continued existance of the trust agreement, and the inclusion of the bonds therein as a current liability, acknowledged the debt.

The trust aggreement, made a part of the bonds by reference (Ex. C-1, R. 14), provided such statements should be open to the inspection of the bondholders. They were submitted to the trustee, the agent of the bondholders. *First National Bank of Boston* v. *Proctor*, (C. C. A. 1), 40 Fed. (2d) 841, certiorari denied, 282 U. S. 863, 51 Sup. Ct. 36, 75 L. Ed. 764. And an acknowledgment to the agent of the creditor tolls the statute. *Olatmans* v. *Glenn*, 78 Okla. 70, 188 Pac. 886, and *Stone* v. *Smoot, supra.*

In the recent case of *First National Bank of Harrah* v. *Wright*, 192 Okla. 182, 135 Pac. (2d) 344, the Court held that the debtor's written application for a new loan, submitted to the creditor, filed with the Oklahoma Commissioners of the Land Office, scheduling the debt there sued upon as an existing liability of the applicant, was an acknowledgment of the debt, tolling the statute of limitations.

*Hanson* v. *Towle*, 19 Kan. 273, cited and relied on by petitioner, was expressly modified prior to the Oklahoma adoption of Kansas statutes in 1893, in *Elder* v. *Dyer*, 26 Kan. 604, decided in 1881, where the Court said:

> "* * * Our statute, to revive a debt or claim, requires only 'acknowledgment of an existing liability' on particular claim in controversy, and this acknowledgment may be in any language which the party making it desires to use. No set phrase or particular form of language is required; anything that will indicate that the party making the acknowledgment admits that he is still liable on the claim, that he is still bound for

its satisfaction, that he is still held for its liquidation and payment, is sufficient to revive the debt or claim; and there is no necessity that there should also be a promise to pay the same, either express or implied. Of course we know that an acknowledgment of an existing liability on an honest debt or claim generally raises an implied promise or contract to pay the same; but whether it does or not, is not a question to be considered in this state. The statute says nothing about an implied contract or promise, and the action, if revived at all, is not to be brought on the implied contract or promise, but only on the original liability. * * *"

The rule of the Towle case was rejected and that in the Dyer case followed by the Oklahoma Courts in *Olatmans* v. *Glenn, supra, Baker* v. *Christy, supra.* The Olatmans case does not say that the party signing must then admit liability (new promise to pay) but says that the party signing must be liable.

Neither is the decision of the Circuit Court in conflict with *Fort Scott* v. *Hickman,* 112 U. S. 163, 5 Sup. Ct. 63, 28 L. Ed. 636, cited by the petitioner, but rather is distinguished therefrom. In that case, though the circular letter relied upon listed the debt, it was not sent to the plaintiff or his agent, and the records of the City Council which scheduled the debt were not discovered by the plaintiff until after he filed suit on the debt.

## CONCLUSION

We submit, periodical financial statements made by a corporate mortgagor to the trustee in pursuance of the terms of the trust agreement, and thereby, open to the inspection of bondholders, which statements repeatedly and consistently scheduled the outstanding corporate bonds as an existing, current liability, showing bond interest charged against earned income, and, similar schedules of the debt in concurrent annual reports to the Oklahoma Corporation Commission, all of which are actually examined and relied upon by the bondholder prior to his purchase of the corporate bonds sued upon, constitute an Oklahoma acknowledgment of the debt sufficient to toll the statute of limitations.

We respectfully submit the petition should be denied and the writ refused.

Respectfully submitted,

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November, 1945.